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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5582 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AMBALAL K SANGHVI AND 1 ANR.

Versus

STATE OF GUJARAT AND ORS.

Appearance:

MR PH PATHAK for Petitioners

MR KG SHETH AGP for Respondent No. 1

NOTICE SERVED to respondent No.2.

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 24/11/2000

C.A.V. ORAL JUDGEMENT

1. Ambalal Khodabhai Sanghvi and Naniben Ambalal Sanghvi - petitioners herein have preferred this petition under Article 226 of the Constitution of India for appropriate writ, order or direction directing the

respondents to regularise the services of the petitioners as Safai-Kamdar, from their initial date of appointment and further directing the respondents to pay difference of wage on the principle of equal pay for equal work, since initial date of appointment with interest at the rate of 12% p.a.

2. The facts of the case may be briefly stated as follows;

That the petitioners have been working as Sweepers in the employment of Makaraba Gram Panchayat in Ahmedabad District which has been joined as respondent No.2 in this petition. The petitioners have claimed that the population of the said village is approximately 5251 and 12 employees have been engaged by the second respondent as Sweepers and the petitioners are two of them. The petitioners have claimed that they perform the duty of cleaning and sweeping work. That their working hours are from 8.00 a.m. to 4.00 p.m. That the petitioners have been continuously working to the satisfaction of the second respondent. That their presence is marked in the Muster Role regularly. That the petitioners are being paid wages at Rs.250/- p.m. and Rs.200/- p.m. respectively. That on the other hand, the regular employees of Class-IV cadre of the second respondent are getting pay scale of Rs.750-940 and thus the regular employees are getting the salary of Rs.1200/- p.m. That newly recruited Helper in Class-IV Shri Ishvarbhai Motibhai is granted salary of Rs.600/- p.m. That Class-IV cadre servants working as Peon who are the juniors to the petitioners are also granted time scale of pay and they are getting Rs.1200/- p.m. Thus the petitioners are only singled out employees. That the services of the petitioners are not being regularised and they do not get salary on the basis of principle of equal pay for equal work. The petitioners have, therefore, claimed that their services be directed to be regularised and they should be paid paid salary in accordance with the pay scale available to regular Class-IV servants. The aforesaid reliefs have been claimed by the petitioners with cost and interest.

3. On receipt of the aforesaid petition, notice was issued at the first instance and thereafter rule was issued in the present petition.

4. The respondent No.1 is State of Gujarat whereas respondent No.2 is the President of Makaraba Gram Panchayat. Mr. K.G. Sheth learned AGP has appeared on behalf of the first respondent pursuant to the rule

served upon the State Government, at the same time, none appears for and on behalf of second respondent i.e. the President of Makaraba Gram Panchayat, and consequently, no affidavit has been filed on behalf of second respondents, whereas, so far as the first respondent is concerned, the relief has been substantially claimed against the second respondent, and therefore, the first respondent would by and large be a formal party, though ultimately the amount may be required to be borne by the first respondent if any order is passed in this petition by this Court.

5. I have heard the learned advocate for the petitioners and Mr. K.G. Sheth, learned AGP for first respondent. Since there is no appearance for and on behalf of the second respondent, there is no question of hearing the second respondent. Even after hearing the learned advocate for the petitioners and the learned AGP, judgement was not dictated immediately as I thought it fit to wait for the appearance on behalf of the second respondent, since it was represented that the second respondent may enter appearance if some time is allowed. Though the matter is old as it was filed in 1988, the second respondent did not appear at the time when the notice was served. The second respondent also did not appear when the rule was served and even after when the matter was posted for hearing on board, none appeared for and on behalf of the second respondent, therefore, I waited for second respondent thinking that the message may go to the second respondent that the matter has been posted for hearing and it has actually been heard by this Court. Thus, this Court provided an additional opportunity to the second respondent but the second respondent has chosen not to appear before this Court and therefore defence of the second respondent is not known.

6. The learned advocate appearing for the petitioner has argued at length that the petitioners are serving with the second respondent since last so many years and even as per the certificate issued by the Talati-cum-Mantri of Makaraba Gram Panchayat on 10/4/1990, the petitioner No.1 Ambalal Khodabhai has put in service since last about 12 years and at the same time, petitioner No.2 Naniben Ambalal has put in service of about 8 years in the Makaraba Gram Panchayat. As per the certificate issued by the Talati-cum-Mantri on 10/4/1990, it seems that even in 1990, the petitioners were in service before 10 and 8 years from that date.

7. The learned advocate for the petitioners has, therefore, argued that in view of the aforesaid position,

the service of the petitioners is required to be regularised and an order may be passed by this Court directing the second respondent No.2 to regularise the service of the petitioners.

8. As against this, Mr. K.G. Sheth, learned AGP has also contested the matter contending inter-alia that the petitioners have not been appointed on regular basis, no required formality of recruitment was gone into, no advertisement was issued, no interview was taken and nothing was done before appointing the petitioners as sweepers. It is further contended by Mr. Sheth on behalf of the first respondent that the petitioners have been appointed without following due procedure of recruitment process. It is further contended that there is nothing on the record to show that there are posts on which the petitioners can be regularised and therefore, there is no case in favour of the petitioners and their petition is required to be dismissed.

9. Mr. K.G. Sheth, learned AGP has further argued that so far as the payment of salary is concerned, the petitioners appear to be working as stated above and no appointment order has been placed on record by them. In view of the above, they cannot be placed at par with regular employees of the second respondent and consequently they cannot be paid the salary payable to the regular employees of class-IV service of the second respondent, and further even prayer relating to the pay scale applicable to Class-IV regular employees cannot be granted to the petitioners. It is further the contention of Mr. Sheth that the petition is without any merit and therefore it may be dismissed with costs.

10. Now it is a fact that the petitioners appear to be working as Sweepers since last so many years. They appear to have been completed 10 and 8 years of service respectively in the year 1990, as per the certificate produced by the petitioner along with the petition at Annexure-A and Annexure-B respectively, dtd. 10/4/1990 at page Nos. 7 and 8 respectively. This fact cannot be disputed for any purpose. Even Mr. Sheth arguing the matter on behalf of first respondent could not dispute this factual aspect. It is more so again when the the second respondent has not come up before this court and no affidavit-in-reply has been filed on behalf of the second respondent. The petitioners are working in the employment of the second respondent, and therefore, first respondent may not have any idea as to the time since when the petitioners have been rendering their services in the employment of the second respondent, therefore Mr.

Sheth was handicapped on the point and he could not oppose this factual aspect of the matter.

11. So far as the regularisation of the petitioners is concerned, firstly there is no material on record to show that the petitioners were regularly appointed on the post on which they are working. The learned advocate for the petitioners was unable to say that the posts were advertised or interview were taken or such other formalities were undergone before the petitioners came to be appointed as Sweepers.

12. When there is no material on record to show that there are posts on which the petitioners can be appointed and the appointment can be regularised. The question of appointment and the question of regularisation can be considered only when there are post available in the employment of the second respondent on which the petitioners could be appointed or for which the case of the petitioner for regular appointment can be considered. When there is no evidence about such post available in the employment of the second respondent, it is not open to this Court to regularise the appointment of the petitioners on the said post.

13. The learned advocate for the petitioner is unable to say that the aforesaid procedure was gone into. He was also unable to stay that there are posts available in the employment of the second respondent on which the petitioners can be considered for regularisation.

14. The petitioners themselves have stated in para 1 of the petition that there are 12 other employees engaged by the second respondent, but it is not clear as to whether the petitioners are senior amongst 12 employees or whether any of those employees is senior to the petitioners. Even if there is a consideration of case for regularisation, the senior most person would naturally be considered first for being regularised, and therefore even on this count also there is no material on record to show that the petitioners are senior amongst those 12 employees. Hence it is difficult to consider the case of the petitioners for regularisation.

15. The learned advocate for the petitioners has relied upon a decision of this Court in the case of Special Civil Application No.2742 of 1988 recorded by this Court (Coram : M.S. SHAH, J.) on 3/3/2000, in which the petitioners were employees of the Gujarat State Land Development Corporation, which is a Government Company registered under the Companies Act, 1956. The

second petitioner was appointed as a workman on daily wage basis by the Joint Director of Agriculture, Rajkot, vide his order dtd. 1/8/1978. His initial appointment was for one year and thereafter, the the said period was extended from time to time.

16. In the same way, the petitioner No.1 was appointed as a Sweeper on daily wages basis by the Joint Director of Agriculture, Rajkot on 24th October, 1980 for a period of one year and the said appointment was extended from time to time on yearly basis. It appears that in the above matter, this Court has held that since the petitioners in the said matter have completed 20 years of service and further considering that the interim relief directing the respondent Corporation to pay the petitioner the salary in their time scale of pay as Class-IV employees and considering the fact that in normal course, even after a period of 20 years' service, the petitioner would even be entitle for voluntary retirement and getting pensionary benefits, the Court is not inclined to disturb that position. Therefore, the petition was allowed and the respondent Corporation was directed to give benefits of regular employees to the petitioners w.e.f. 1/6/1988, without any further liability to pay any further monetary benefits for the period during which the petition was pending before the Court for last about 12 years.

17. While allowing the said petition, this Court has clarified that the order may not be treated as precedent as the order is passed in the peculiar facts and circumstances of the case, particularly considering the facts that the petitioners have completed 20 years of service and the interim relief was operating in favour of the petitioners since 1988. It is further clarified that it is upon to the respondent Corporation to take the service of the petitioners at any place in the State of Gujarat. The aforesaid decision will naturally not apply in the facts and circumstances of the present case. Firstly, in the aforesaid case, it was made clear that the said order was passed in peculiar facts and circumstances of the case. It has also been made clear that the aforesaid decision will not be cited as precedent. Moreover, interim relief was granted and under the interim relief the petitioners of the aforesaid petition, were getting the salary of Class-IV service.

18. In the facts and circumstances of the present case, the interim relief which was granted at the first instance was as claimed in para 5(E) of the petition. There the interim relief claimed is that pending

admission and final disposal of the petition, Court should restrain the respondents from terminating, discharging and/or discontinuing the services of the petitioners.

19. Therefore, it is clear that during the pendency of the petition, no order was passed directing the second respondent to pay pay scale of Class-IV employees to the present petitioners. Therefore, the petitioners are naturally not getting the salary available to class-IV employees of the State Government even during the pendency of the present petition. Therefore, the facts of the case cited and the facts of the present case are not identical and therefore it is difficult to say that the decision cited is squarely applicable to the facts of the present case.

20 As against this, learned AGP has heavily relied upon the decision of the Hon'ble Apex Court rendered in the case of State of U.P. versus Ajay Kumar, reported in (1997) 4 S.C.C. 88, in which it has been held that a daily wager is not entitled for regularisation. The Hon'ble Supreme Court has further observed that there must exist a post and other administrative instruction or statutory rules, in operation to appoint a person to the post. It is further observed that daily wage appointment will obviously be in relation to contingent establishment in which there cannot exist any post and it continues so long as the work exists. It is further observed that under these facts, the division bench of the High Court clearly erred in directing to regularise the service of the respondent who was working on daily wage basis as and when the vacancy would arise.

21. Another obstacle in the way of the petitioners is also a decision of the Hon'ble the Supreme Court rendered in the case of P.Raveendran Vs. Union Territory of Pondicherry, reported in (1997) 1 SCC 350, wherein also the regularisation in service by-passing the process of recruitment through open competition to be held by the Public Service Commission was strongly disapproved in following words ;

> "This Court in a catena of decisions has deprecated this practice of regularisation except in extraordinary cases by directing the Government to frame a scheme and regularise classes-III and IV services in accordance with the scheme. Even in subsequent decisions, that leverage is not being insisted upon. This Court in J&K Public Service Commission vs. Dr.

Narinder Mohan had held that the Court cannot adopt hybrid process of direction to regularise the services bypassing the process of selection envisaged under the Constitution."

In the case before me, the selection would not be through the Public Service Commission. But the principle will certainly apply to the facts of this case. There cannot be any appointment in any Public Service without going through proper procedure. Advertisement was to be issued. Equal chance and opportunity to be given to all the deserving candidates who may be desirous to join such a public service. Some sort of tests or interviews can be arranged. Thereafter, selection can be made only on merits. When no such procedure is followed, the appointment, otherwise than by such a procedure or by a procedure laid down by rules, would not be regular appointments and hence such appointments made without following such procedure cannot be regularised. If the services of such back door entrant are regularised, it would negative equal opportunity to all those wanting to join such services. It would also amount to denial of equal opportunity to the meritorious persons. The second respondent being a Local Self Government i.e. a State under Article 12 of the Constitution of India, is expected to use equal yardstick for equals. It therefore, cannot show any discrimination or favouritism for any person or class of persons.

22. It is further clear that when the petitioners have not been regularly appointed after following due procedure of recruitment, then they cannot be regularised. It is more so when it is not known to us as to whether there are posts on which the petitioners can be regularised. Moreover, it is not clear as to whether or not the petitioners are senior most amongst the 12 employees working on the same post. Even appointment order has not been produced showing that the petitioners are regular appointees. In absence of any order of appointment of the petitioner, the date, terms and conditions of the appointment cannot be ascertained.

23. It is well settled that when there is any back door entry, then in that event, it is not just, legal and proper to encourage such back door entry. Such back door entry would negative the claim of the meritorious persons. A practice has been developed to appoint some persons either on temporary basis or on daily wage basis without following any procedure. Thereafter, such persons are continued for a very long time and thereafter

such persons claim that they should be regularised. Matters are filed in the Court and the employers remain absent. By this process of remaining absent, some times orders are invited from the Court and sometimes Court may be inclined to pass order for regularisation in absence of defence of the respondents or in absence of appearance on behalf of the respondents. If by this way, the services of the employees who are initially appointed without due process of recruitment, are regularised under the orders of the Court, this would again negative the meritorious employees. Simply because there is no appearance filed on behalf of the second respondents, it would not be just, legal and proper for this Court to allow the petition blindly and direct that the second respondent to regularise the service of the petitioners. It is more so when the aforesaid facts are totally not known and the learned advocate for the petitioners has also not been able to show that there are posts on which the petitioners can be regularised. He is also not in a position to state that due procedure of recruitment was followed before the petitioners came to be appointed. He is also not in a position to tell as to what is the seniority of the petitioners amongst those 12 working with the petitioners. In that view of the matter, the prayer for regularization cannot be granted to the petitioners.

24. Another aspect of the case is that the petitioners have claimed salary payable to the regular employees of class-IV service. It is seen that while filing the petition, the petitioners have claimed same relief, even at the stage of admission, such relief was claimed, however, record shows that such relief was not granted to the petitioners either at the initial stage when the notice was issued, or at the stage when the rule was issued. Only interim relief was granted that the service of the petitioners shall not be terminated pending hearing and disposal of the petition.

25. Moreover, it is to be seen that there is nothing on the record to show that the petitioners are regular appointees and unless they are regularly appointed in Class-IV cadre, they cannot get the salary payable to the regular employees belonging to class-IV cadre. A daily wager is quite different from a regularly appointed class-IV employee, therefore, even if a Peon has been subsequently appointed by the second respondent, the petitioners cannot be placed at par with that Peon who may have been regularly appointed in the cadre of class-IV servants. As stated above, a daily wager who is paid salary from contingent fund is different from

regularly appointed class-IV employee, therefore, it is not the case of equal pay for equal work because the method of selection is different, method of recruitment procedure is different and therefore, there is nothing equal between them. In that view of the matter, the petitioners cannot get the salary at par with the salary payable to a class-IV employee who has been regularly appointed on that post.

26. The learned advocate for the petitioners has relied upon a resolution of Government dtd. 17/10/88 issued by the Government of Gujarat in Road and Building Department. It appears that a Committee was appointed by the State Government under the Chairmanship of Shri Dolatbhai Parmar who was the then Minister in-charge of the Road and Building Department. The Committee appears to have made certain recommendations and the State Government appears to have accepted the recommendations of the Committee and has passed the aforesaid Government Resolution which has been passed on 17/10/1988. As per the said resolution, different benefits have been extended to the daily wagers. This benefits are available to the employees subject to fulfillment of requirement of the said Government Resolution. Now whether the present petitioners have fulfilled the requirement of the said resolution or not would be a question of fact. In fact, the petitioners have not filed their petition on the strength of the said resolution. Not only that but the petitioners have not amended the petition so as to take the benefits of the said resolution, though the petition was filed in 1991. It is no-where stated in the petition by the petitioners that the petitioners have fulfilled the requirement of the said resolution. They do not say that they had made representation to the second respondent for extending the benefits of the said resolution and they are entitled to the benefits of the said resolution and yet the second respondent has not been extending the benefits of the said resolution. In absence of such pleading on the basis of such a resolution in the petition, it would not be open to the petitioners to argue before this Court at the stage of argument without pleading that the benefits of the said resolution be ordered to be extended to the petitioners, and therefore, the relief relating to the said resolution can also not be granted to the petitioners.

27. At the same time, it may be upon to the petitioners to make appropriate representation to the second respondent and obtain appropriate order. In case the petitioners do not succeed and and not get favourable

orders, it would be open to the petitioners to take appropriate steps for getting benefits of the said resolution, if the petitioners otherwise entitled to the benefits thereof. However, as stated above, the factual aspects are involved in the matter and those aspects are required to be considered which can be considered only if the materials are placed on record to show that the petitioners have fulfilled the requirements of the said resolution and they are entitled to the benefits of thereof. Those materials are not on record and therefore, it is not possible to appreciate the same.

28. In view of the matter, the petition of the petitioners for regularisation of their service as well as for direction to the second respondent to pay them salary payable to the regularly appointed class-IV servants, cannot be allowed, since it is without any merit and consequently the petition deserves to be dismissed. In view of the aforesaid position, the petition is dismissed with no order as to costs. Rule discharged. Interim relief vacated.

29. However, it is made clear that it would be open to the petitioners to make appropriate representation before the respondents for appropriate relief either in in view of the Government Resolution dtd. 17/10/1988 issued by the Government in Road and Building Department or otherwise. In case the petitioners do not succeed, it would be open to the petitioners to take appropriate steps in accordance with law.

(D.P. BUCH, J.)

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